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Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ALCUS SMITH AND KAY SMITH
Petitioners,

V.

CHEVRON U.S.A., INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause prohibit a state from imposing, through judicial fiat, an expensive and time-consuming procedural burden only upon a discrete class of landowners, thus restraining class members' right to seek legal relief for injury, where neither the legislature, the fact finder, nor any other source has provided a rational basis for the discriminatory treatment?

PARTIES TO THE PROCEEDING

Alcus Smith and Kay Smith, husband and wife:

Plaintiffs in the Circuit Court of Hinds County, Mississippi;
Appellees in the Supreme Court of Mississippi;
Petitioners before this Court.

Chevron U.S.A., Inc.:

Defendant in the Circuit Court of Hinds County, Mississippi;
Appellant in the Supreme Court of Mississippi;
Respondent before this Court.

Three other corporations - **Chevron Corporation, Coho Resources, Inc.** and **Florabama, Inc.** - were parties to the trial court litigation, but were either dismissed pursuant to summary judgment motion before trial (Coho Resources, Inc. and Florabama, Inc.) or were not found liable by the jury at trial (Chevron Corporation). Therefore they were not parties to the proceedings in the Mississippi Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Alcus and Kay Smith respectfully petition this Court for a writ of certiorari to review a judgment of the Supreme Court of Mississippi, entered in this proceeding on October 17, 2002.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Mississippi is reported at 844 So.2d 1145 and is reproduced in Appendix A, beginning at 1a. The May 22, 2003 order denying the Smiths' Motion for Rehearing has not, as yet, been reported; it is reproduced in Appendix C, at 16a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 17, 2002. By order of May 22, 2003 that court denied a timely filed motion for rehearing. Jurisdiction exists under 28 USC §1257(a), pursuant to which final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari .... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution....

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code Ann. §53-1-29 provides:

> § 53-1-29. Hearing request.
>
> Any interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the board by making a request therefor in writing. Upon the receipt of any such request, the board promptly shall call a hearing thereon, and, after such hearing and with all convenient speed, and in any event within thirty (30) days after the conclusion of such hearing, shall take such action with regard to the subject matter thereof as it may deem appropriate.

STATEMENT OF THE CASE

Facts and Procedural History

In 1979 Alcus and Kay Smith purchased a 55-acre tract of land in Lincoln County, Mississippi, upon which they intended to build their future retirement home. Years later, the Smiths discovered that their land, and the groundwater beneath it, was contaminated by oil field waste. Much of the waste was toxic; some of it was radioactive.[1]

The Smiths sued the oil companies responsible for contaminating the land. The litigation was expensive and time-consuming. Lengthy, protracted discovery produced tens of thousands of documents and multiple depositions of expert and fact witnesses. The delays inherent in litigation against large corporate defendants were compounded by the bankruptcy of one of the oil companies.

The case was finally tried to a jury, over a period of seven weeks, in February, March and April, 1999. The testimony revealed that Chevron had not only introduced toxic materials to the soil and groundwater in the Brookhaven Oil Field, where the Smiths' property was located, but had done so knowingly since the 1950s. Despite the recommendations of its own employees, Chevron refused to make any effort to cease the contamination, much less to clean it up. Instead, Chevron sold the field to a small oil company (Florabama, which filed for bankruptcy on the eve of the first scheduled trial date).

The Smiths' experts testified that, in order to rid the Smiths' property of the toxic materials that contaminate the surface, it will be necessary to literally remove the topsoil from the property and deposit it at a nuclear waste facility,

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[1]Dr. Thomas Schrager, a toxicologist, testified that the Smiths' property and the Brookhaven Field should not be utilized for human habitation, especially for children. After the passing of 1,620 years - that is to say, sometime in the early 37th Century - only one-half of the Radium 226 on the Smiths' property will have decayed.

at a total cost of $2,349,275.00. The jury returned a compensatory damage verdict in favor of the Smiths and against Chevron in precisely this amount.[2]

Following the jury's compensatory award, the trial court submitted the question of punitive damages to the jury. The jury ultimately deadlocked on that issue, resulting in a mistrial on the punitive damage phase. Post-trial motions were filed by both sides, and, after briefing and argument, were denied. Cross appeals were taken to the Mississippi Supreme Court.

The Supreme Court of Mississippi reversed the judgment of the trial court. For purposes of the instant petition, it is important that no new evidence, of any sort, was presented to the Mississippi Supreme Court as part of the appeal. The decision sought to be reviewed in this Court was founded entirely upon the record made at trial.

Preservation of the Constitutional Issues

The federal issue arose after the trial and not until the Supreme Court of Mississippi published its opinion, which first created the disparate treatment at issue here. The Smiths promptly filed a motion for rehearing, raising state issues as well as the federal equal protection problem.[3] Chevron's response also addressed the constitutional question.[4] The Mississippi Supreme Court's denial of the

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[2]All but two of the original defendants had been dismissed from the case before trial began. Chevron Corporation, the parent company of Chevron, U.S.A., was not found liable by the jury.

[3]The pertinent portion of the Smiths' motion for rehearing is reproduced in Appendix D, beginning at 17a.

[4]The pertinent portion of Chevron's response to the motion for (continued...)

motion for rehearing must therefore be assumed to be deliberate.[5] Because no independent state grounds for resolving the Equal Protection issue were announced, it is presumed that they did not exist. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

ARGUMENT

Section One of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." The State of Mississippi, acting through its supreme court, has violated the Equal Protection Clause by its promulgation of the opinion in this case. Owners of land contaminated by radioactive oil field waste are now required to jump through hoops which do not constrain other landowners, at significant cost in time and treasure. Where previously they had two options available to redress their injuries - through a civil suit or through an administrative proceeding - they now have only one. The means of the state's infliction of this injury are through judicial fiat rather than legislative enactment. No rational basis supports the disparate treatment. The Mississippi Supreme Court's stated rationale was based upon facts which had been rejected by the factfinder. Indeed, the court was required to ignore its own jurisprudence in order to reach its desired result. Significantly, the Mississippi legislature itself expressed no need for the disparate treatment.

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[4](...continued)
rehearing is reproduced in Appendix E, beginning at 29a.

[5]The Supreme Court of Mississippi's order denying the motion for rehearing is reproduced in Appendix C, at 16a. No separate opinion accompanied the order.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action...." *Cooper v. Aaron*, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958).[6]

The Equal Protection issue was squarely presented to the Mississippi Supreme Court. That court's silence is the equivalent of its assertion that the Equal Protection Clause does not bar this discriminatory result. Consequently the highest court of the State of Mississippi has decided an important issue of federal law - whether the Equal Protection Clause bars injurious, disparate treatment of individuals without meeting at least a rational relationship test - in a manner at odds with all relevant decisions of this Court. In addition, the case is of significant public interest. The *Smith* decision already binds and oppresses the citizens of Mississippi.[7] It may be expected to be used as support for similar judicial activism in other jurisdictions. It discourages - if it does not, in fact, prohibit - private enforcement of

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[6]*Avery v. Midland County, Tex.*, 390 U.S. 474, 479-480,88 S.Ct. 1114, 1117-1118, 20 L.Ed.2d 45 (1968). An adverse decision by the state court of last resort upon any right, title, privilege, or immunity especially set up or claimed under the Constitution or laws of the United States is treated in the same manner as if the state legislature had enacted such a statute. *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 10 44, 27 A.L.R. 27 (1922).

[7]Ironically, the case which was cited as the foundation for the *Smith* opinion, *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss.1999), has since been dismissed - based upon the *Smith* opinion!

environmentally-sound policies - a signal transmitted by judicial decree, rather than by legislative process.

The disparate treatment

For all practical purposes, Mississippi has always permitted landowners to recover in a civil action for damage to their real property. Mississippi courts have consistently held that "where damage to land is temporary and subject to restoration, the proper measure of damage is the cost of restoration."[8] The Supreme Court of Mississippi has followed this doctrine even where the cost of restoration has exceeded the diminution in the property's market value.[9]

The *Smith* opinion changed this - but only for landowners whose properties have been contaminated by oil field waste which falls within the jurisdiction of the Mississippi Oil and Gas Board (OGB). As to that class of people, the Supreme Court of Mississippi has now announced an irrebuttable presumption that their recovery of the cost of restoration is, *per se*, unjust enrichment, and will no longer be permitted. Owners of land damaged by other, non-oil field waste substances, retain their right to recover the cost of restoration. The distinction, therefore, is entirely dependent upon the manner in which the injury is inflicted upon the property owner. Had Chevron simply scattered radium - or arsenic, or any other toxic substance - on the

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[8] *R & S Development, Inc. v. Wilson*, 534 So.2d 1008, 1012 (Miss. 1988).

[9] See *Teledyne Exploration Company v. Dickerson*, 253 So.2d 817, 819 (Miss. 1971). A contractor whose blasting damaged plaintiffs' home was required to pay the cost of repair; his effort to introduce the presumably lower cost of diminished value was denied, and this was affirmed by the Supreme Court of Mississippi.

Smiths' property, the Smiths' suit would have been perfectly proper.

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance....A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[10]

The injury

As to the Smiths, of course, the injury arising from the disparate treatment is onerous. The extensive costs invested in their trial, the years which have been devoted to the litigation, are dwarfed by the time which must be invested in doing it all over again - this time with the added step of pursuing a dubious administrative proceeding before the Mississippi Oil and Gas Board.[11] The Smiths have thus

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[10]*Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

[11]In an opinion highly critical of the *Smith* decision, the Supreme Court of Louisiana recently observed: "However, we also recognize the policy concern asserted by plaintiffs in that if landowners cannot sue for cleanup costs - especially where, as here, they have a contract in hand - it would leave only understaffed and underfunded state agencies to oppose the oil companies. In this situation, there is still a strong possibility that the land will remain polluted." *Corbello v. Iowa Production*, ___ So.2d ___, 2003 WL

(continued...)

"alleged such a personal stake in the outcome of the controversy' (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf."[12]

The injuries to the broader landowner class (those whose land is afflicted by oilfield waste) are similar to the Smiths'. They must now submit themselves to the jurisdiction of an agency which has never demonstrated an inclination to order oil companies to clean up their pollution.[13] They must incur the additional expense incident to the exercise, and devote the additional time to the process. Most dramatically, if (as expected) the OGB should *not* order a cleanup, the landowners *will never be permitted to recover the cost necessary to clean up their land.* This is because the remediation costs will almost always exceed the diminished market value, particularly in rural Mississippi,

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[11](...continued)
536727, 2002-0826 (La. 2/25/03), *rehearing granted in part*, ___ So.2d ___, 2003 WL 21417579, 2002-0826 (La. 6/20/03).

[12]*Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). *Accord*: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

[13]For example, in all the decades Chevron operated the Brookhaven field, the Oil and Gas Board did, precisely, nothing. Film introduced at the trial showed that the OGB had actual knowledge of the contamination in the Brookhaven Field by the late 1980s. Despite this, the Board never ordered a cleanup of the Smiths' property, or of ***any*** property in the field, not in the 50 years Chevron contaminated the land, not in the 16 years since Chevron told the EPA and the OGB that there was NORM on and under the land, not in the seven years of the Brookhaven litigation, and not to the present day.

and the supreme court of that state has now ruled that such a recovery amounts, in all cases, to unjust enrichment.

The lack of rational basis

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *McLaughlin v. State of Florida*, 379 U.S. 184, 189-190, 85 S.Ct. 283, 286-287, 13 L.Ed.2d 222. It also imposes a requirement of some rationality in the nature of the class singled out.[14]

Denial of equal protection is permissible if a certain level of state interest supports the disparate treatment. At minimum, a rational basis is required to justify the imbalance [cite]. Although the Supreme Court of Mississippi attempted to supply such a foundation for its judicial legislation, it is clear that no such justification exists.

First: The court's primary stated reason for its ruling - that precedent mandated such a result - is patently false.

The *Smith* opinion very plainly, and very broadly, holds that a landowner is not permitted to prosecute a civil action to recover damages caused by radioactive oilfield contamination unless he has first exhausted his administrative remedies at the Oil and Gas Board. The opinion is explicitly based on the court's earlier ruling in *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss.1999). "This Court cannot ignore *Donald* and fail to force the Smiths to seek relief from the Oil and Gas Board

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[14]*Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577 (1966).

before filing suit in the trial court."[15] Yet *Donald* reached no such result; in fact, *Donald* required the landowner to exhaust administrative remedies only for claims based upon administrative agency regulations. *Donald* permitted the landowners to continue prosecuting all other claims.[16] The *Donald* opinion expressly observed that "the [oil and gas] statutes and regulations do not provide for or prohibit private causes of action."[17] The *Donald* opinion, therefore, provides only a pretext for the result in *Smith*.

Second: To the extent that the court perceived that Mississippi's statutory and regulatory scheme required an exhaustion of Oil and Gas Board remedies, that conclusion was unsupported by any evidence placed before the court. The statute does not require pursuit of an administrative remedy, as the Mississippi Supreme Court observed in *Donald*.[18] No testimony was presented, at trial or otherwise,

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[15]*Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

[16]The *Donald* opinion discusses, at some length, each of these surviving claims: nuisance, trespass and strict liability; nuisance *per se*; negligence; breach of contract; and intentional infliction of emotional distress. Only negligence *per se*, i.e. negligence based upon violation of oil and gas regulations, was dismissed for failure to exhaust administrative remedies. The Smiths, in their trial, prevailed upon ordinary principles of negligence, a claim which the *Donald* court remanded to the trial court for further proceedings.

[17]*Donald v. Amoco Production Co.*, 735 So.2d 161, 177 (Miss. 1999).

[18]Miss. Code Ann. §53-1-29 provides only that "[a]ny interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the (continued...)

on that topic. Indeed, the *Smith* opinion itself does not purport to find any such legislative mandate.

Third: The issue which appears to have been strongest in the court's mind - that the Smiths would not spend their recovery on cleaning up the contamination - was a fact question which was rejected by the jury at trial. Under the Mississippi Supreme Court's own precedent, such a jury finding was binding on appeal.

The central assumption of the *Smith* opinion is that the Smiths will not spend their recovery to restore their property:

> Nor will this Court allow a windfall to the plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup.[19]

This holding flies in the face of decades of well-established law in Mississippi.

The Supreme Court of Mississippi has long held that the jury's findings of fact are entitled to deference on appeal. The jury necessarily found that the Smiths intended to spend their recovery on removal of the radioactive contamination. Mr. Smith so testified. Chevron strenuously argued to the jury that the Smiths would keep the money and not perform the cleanup; the jury's award of the exact cleanup costs

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[18](...continued)
jurisdiction of the board by making a request therefor in writing."

[19]*Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

clearly rejected this argument.[20] The fact question was thus resolved, by the jury, in the Smiths' favor.

It is black letter law in Mississippi, as elsewhere, that the jury's findings of fact are conclusive on appeal:

> On appeal, this Court must give deference to the factual conclusions reached by the jury. Findings of fact supported by credible evidence may not be set aside on appeal. *Allgood v. Allgood,* 473 So.2d 416 (Miss.1985).[21]

The *Smith* opinion, therefore, does not simply ignore the jury's finding. It actually reaches the opposite conclusion.

Another well- and long-established principle of appellate review in Mississippi is that an appellate court must view the facts in the verdict winner's favor.

> Since the jury's verdict was in favor of the defendants, as an appellate court "we must

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[20]Both sides agree that the jury's award was the exact cost of cleanup, according to plaintiffs' experts.

[21]*Herrington v. Spell*, 692 So.2d 93, 99 (Miss. 1997). Accord: *Scott Prather Trucking, Inc. v. Clay ex rel. Sanders*, 821 So.2d 819 (Miss. 2002) (If evidence is contradicted, the reviewing court will defer to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial); *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2001) (Appellate court reviews evidence as a whole, taken in light most favorable to the jury's verdict, and will reverse only if no reasonable, hypothetical juror could have found as jury found); *Booker ex rel. Certain Underwriters at Lloyd's of London v. Pettey*, 770 So.2d 39 (Miss. 2000) (Appellate court gives substantial deference to a jury's findings of fact and to the trial judge's determination that a jury issue was present and tendered).

> view the facts in the light most favorable to them, and consider as true all evidence in their favor, together with all reasonable inferences which may be drawn therefrom." *Ill. Cent. R. Co. v. Williams*, 242 Miss. 586 at 594, 135 So.2d 831 at 833 (1961).[22]

In finding that the Smiths "obviously have no intention of cleaning up their property since they have refused all such offers of cleanup," the Supreme Court of Mississippi ignored that principle. Viewed in the light most favorable to the verdict winners, the cleanup offer, such as it was, was made too late (on the eve of trial) and was too vague to have any value. The Smiths' refusal of Coho's cleanup offer did not signify the Smiths' refusal to clean up their land. Indeed, it meant just the reverse: the Smiths insisted on recovering the actual cost of an adequate cleanup so that it could be done the right way, and not the obviously insufficient cleanup proposed by COHO. In the long history of oil field contamination, oil companies have not been famous for conducting environmentally responsible cleanups. In the particular context of the Brookhaven Field, evidence of prior oil company attempts to clean up contamination obviously put the Smiths on notice that if they wanted the job done right, they would have to do it themselves.

Consistent with general principles of appellate review, Mississippi holds that an appeal must be decided on the basis of facts which appear in the record, not statements made in the briefs.

> We must "decide each case by the facts shown in the record, not assertions in the brief ...."

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[22] *Elsworth v. Glindmeyer*, 234 So.2d 312, 326 (Miss. 1970). Accord: *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss.1997); *Junior Food Stores, Inc. v. Rice*, 671 So.2d 67, 76 (Miss.1996); *Bell v. City of Bay St. Louis*, 467 So.2d 657, 660 (Miss.1985).

> *Burney v. State,* 515 So.2d 1154, 1160 (Miss.1987) (quoting *Mason v. State,* 440 So.2d 318, 319 (Miss.1983)). *Accord, McDerment v. Miss. Real Estate Comm'n,* 748 So.2d 114, 120 (Miss.1999); *Phillips v. State,* 421 So.2d 476, 478 (Miss.1982) ("[C]onsideration of matters on appeal is limited *strictly* to matters contained in the trial record ....") (emphasis in original). "[O]ur review ... will include only those facts actually contained in the record and to those arguments contained in the appellant's brief, the appellee's brief, and the appellant's rebuttal brief." *Id.*[23]

One of the troublesome aspects of the *Smith* decision is that it is founded on "facts" which appeared only in Chevron's briefs. Thus, for example, the Court found that

> [a]fter trial, COHO filed for bankruptcy. Chevron and COHO entered into an agreement for removing equipment and soil containing NORM from the entire Brookhaven field, which was approved by the Bankruptcy Court, the Mississippi Oil and Gas Board, ("Board) and the Mississippi Department of Health. Many plaintiffs who sought relief in Lincoln County from the same defendants have allowed the cleanup. The Smiths filed this lawsuit immediately upon

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[23]*Oakwood Homes Corp. v. Randall,* 824 So.2d 1292, 1293 (Miss. 2002). Accord: *Yancey v. Yancey,* 752 So.2d 1006, 1012 (Miss. 1999) ("This Court, however, considers only those facts that actually appear in the record and will not rely on mere assertions in briefs. *Touchstone v. Touchstone,* 682 So.2d 374, 380 (Miss.1996); *American Fire Protection, Inc. v. Lewis,* 653 So.2d 1387, 1390 (Miss.1995)").

learning of the contamination and have continued to refuse the cleanup.[24]

None of these "facts" is supported by the record in this case. Most of them are inaccurate, if not actually false. For example, Chevron's Brookhaven cleanup plan has never been approved by either the Oil and Gas Board or the Department of Health. Instead, Chevron and COHO obtained a letter written by one official of each of those agencies, which indicated that the plan appeared to comply with regulations. There has never been a hearing conducted under the Oil and Gas Board's regulations to test the sufficiency of the plan. Similarly, the Dallas bankruptcy court never "approved" the plan in terms of the plan's adequacy under any sort of cleanup standard. Indeed, the bankruptcy court specified that landowners could challenge the cleanup plan if and when Chevron tried to implement it on their land. And the cleanup offered to the Smiths by COHO on the eve of trial is not the same as the Brookhaven field cleanup (the latter plan appears to have been drafted well after the verdict in the Smith case).

These findings were important foundations of the *Smith* opinion. Yet they are not facts, and they do not appear in the record. They do not provide a rational basis for the court's disparate treatment.

Fourth: By grafting onto the statute an exhaustion of administrative remedies requirement, the *Smith* court invaded the province of the legislature. This is a separation of powers violation clearly prohibited by the Mississippi Constitution, and can therefore not serve as a rational basis for imposing unequal treatment on Mississippi landowners.

The core of the *Smith* opinion is this:

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[24] *Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1147 (Miss. 2002).

> Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of NORM contamination.[25]

As the Supreme Court of Louisiana observed in *Corbello*, the Mississippi Supreme Court here "merely expressed its sentiment that the citizens of Mississippi are better served by resorting to the regulatory agency rather than waiting for the private landowner to bring an action for damages where there is no guarantee that the pollution would be eradicated."[26] The Mississippi Constitution, however, does not permit a court to convert its "sentiment" into legislation. Courts in that state cannot amend statutes by judicial construction; *State v. Heard*, 151 So.2d 417 (Miss. 1963).

> The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the Legislature. Neither have the courts authority to write into the statute something which the Legislature did not itself write therein, nor can they ingraft upon it any exception not done by

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[25] *Chevron U.S.A., Inc. v. Smith*, 844 So.2d 1145, at 1148 (Miss. 2002).

[26] *Corbello v. Iowa Production*, ___ So.2d ___, 2003 WL 536727, 2002-0826 (La. 2/25/03), *rehearing granted in part*, ___ So.2d ___, 2003 WL 21417579, 2002-0826 (La. 6/20/03). The Louisiana Supreme Court, in *Corbello*, rejected the *Smith* result and preserved the landowner's right to maintain an action for recovery of restoration costs.

> the lawmaking department of the government.[27]

The Mississippi Supreme Court had noted in *Donald* that the statutes and regulations establishing and governing the Oil and Gas Board "do not provide for or prohibit private causes of action."[28] Yet the *Smith* decision now prohibits a private cause of action to recover restoration costs. Indeed, it goes further, and judicially creates a requirement to prosecute a proceeding before a state agency, although the legislation establishing that agency contains no such requirement. The result violates Mississippi's separation of powers doctrine, as contained in Article 1, Section 1 of the Constitution.[29] The Mississippi legislature might have the resources and authority to enact legislation requiring an exhaustion of Oil and Gas Board remedies, but it has not done so. The Mississippi Supreme Court, as it has repeatedly stated, cannot, because it lacks the constitutional authority to convert sentiment to statute.

In the end, there is no rational basis supporting the unequal treatment of Mississippi landowners created by the *Smith* opinion.

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[27] *Hamner v. Yazoo Delta Lumber Co.,* 100 Miss. 349, 56 So. 466, 490 (1911), cited in *Wallace v. Town Of Raleigh*, 815 So.2d 1203, 1208 (Miss. 2002).

[28] *Donald v. Amoco Production Co.*, 735 So.2d 161, 177 (Miss. 1999).

[29] "The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."

CONCLUSION

The law of Mississippi now treats similarly-situated people unequally. It imposes an injury on landowners who have the additional misfortune to have suffered contamination of their property by oil field waste. There is no rational basis for making such a distinction. The statutory law of Mississippi does not call for such a result. The other reasons relied upon by the Mississippi Supreme Court are pretextual, because they fly in the face of that court's longstanding jurisprudence. The fundamental reason for the decision is the court's legislative finding, which the Mississippi Constitution prohibits the court from making. There are no rational bases for the disparate treatment imposed by the court.

That the *Smith* opinion violates the Equal Protection Clause has been pointed out to that court, and the court has refused to remedy the violation. The highest court of the State of Mississippi has therefore decided an important issue of federal law, in a manner which calls for this Court to grant certiorari and reverse the violation.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSISSIPPI

CHEVRON U.S.A., INC.
v.
ALCUS SMITH AND KAY SMITH

No. 1999-CA-01658-SCT

Oct. 17, 2002
Rehearing Denied May 22, 2003

EN BANC

SMITH, P.J., for the Court.

¶ 1. In this oil field contamination case, Chevron, U.S.A., Inc. appeals from a judgment against it awarding landowners Alcus and Kay Smith $2,349,275.00 in damages in accordance with the jury's answers to special interrogatories. The jury found Chevron 100% liable, but it deadlocked on the issue of punitive damages. The trial court granted a mistrial as to punitive damages, but it denied a new trial on that issue since a different jury would have to hear it, in violation of Miss.Code Ann. § 11-1-65 (2002). Chevron timely appealed to this Court, and the Smiths cross-appealed on the issue of punitive damages.

¶ 2. On appeal, Chevron contends (1) that the judgment for property damages should be set aside because the damages are limited to diminution in property value which the Smiths recovered from a settling defendant; (2) that the judgment should be reversed in favor of Chevron because the Smiths unreasonably refused to allow remediation by COHO, the current operator of the field; and (3) that the jury's finding that Chevron did not act as a reasonably prudent operator was unsupported by the evidence. On cross-appeal, the Smiths claim they are entitled to a new trial on the issue of

punitive damages. In its amicus curiae brief the Mississippi Independent Producers and Royalty Owners Association ("MIPRO") raised the issue that venue was improper in Hinds County.

¶ 3. We find that the trial court erred in allowing a jury trial as the Smiths failed to exhaust administrative remedies before seeking relief in the trial court. *Donald v. Amoco Prod. Co.*, 735 So.2d 161 (Miss.1999). The Smiths were required under our precedents to first seek restoration of their property from the Mississippi Oil and Gas Board before a trial court could consider the issue and possibly assess an appropriate measure of damages. Accordingly, we reverse the trial court's judgment, and we render judgment here dismissing the Smith's complaint and this action without prejudice for failure to exhaust administrative remedies. The Smiths must seek relief before the Oil and Gas Board.

FACTS

¶ 4. In 1943, Chevron acquired a mineral lease to the Brookhaven field "for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, store, transport and manufacture said minerals, and hous[e][ ] employees." Eventually the field was unitized,[30] and Chevron became the designated field operator. In 1966, Chevron built a saltwater facility on one acre of the field to serve the oil wells throughout the entire field.

¶ 5. Saltwater is a natural by-product of oil and gas production, and the saltwater facility in the field took

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[30]All of the royalty owners and operators of the different tracts in the Brookhaven field agreed to pool the tracts into a single unit for consolidated operations.

saltwater in by pipelines and stored it until it was disposed of or injected into wells. Some of the formations from which the oil was produced contained naturally occurring radioactive material ("NORM") which was also present in the water solution that was produced along with oil. The saltwater pipelines and storage tanks at issue in this case contained NORM. Small amounts of NORM can build up over time and can eventually lead to radioactive levels, which is what happened in this case.

¶ 6. In 1979, the Smiths purchased the surface rights to 55 acres of the Brookhaven field. The Smiths lived in Wisconsin at the time, but they bought the land for the purpose of building their retirement home on it. They were aware of the oil and gas operations, including the saltwater facility that was located on the land they purchased. The saltwater facility was operated by Chevron until it sold its interest in the field to Florabama in 1990. The Smiths contend that the facility was abandoned around the time they purchased the land in 1979. Chevron claims the saltwater facility at issue was still in active operation at the time it sold its interest to Florabama.

¶ 7. The contract between Chevron and Florabama financially obligated Florabama for any environmental cleanup. Florabama operated the field until 1995, when it sold its interests to COHO, whose contract in turn made it financially responsible for any cleanup. COHO continues to operate the field today.

¶ 8. In 1994, neighbors of the Smiths' property informed the Smiths that the equipment on their property might contain NORM. This discovery was made after government testing showed that the drinking water of many of the residents had been polluted by Chevron's operations. In 1996, the Smiths filed this lawsuit against Chevron and its parent company, Florabama, COHO and other defendants in Hinds County Circuit Court. The trial court found that Florabama did not operate the saltwater facility in question and granted

summary judgment in its favor. Florabama filed for bankruptcy a month before trial began. At the conclusion of trial, the Smiths appealed the dismissal of Florabama to this Court. While on appeal, Florabama settled with the Smiths for $75,000, and it was voluntarily dismissed.

¶ 9. The record indicates that one of Chevron's experts testified that one week before trial COHO made an offer to remove the saltwater facility, but the Smiths contend the offer was not made until the eve of trial. Nevertheless, the Smiths refused the offer. In light of the refusal, COHO was granted summary judgment precluding the Smiths from recovering the cost of removal from it. This left only Chevron and its parent company as defendants. After trial, COHO filed for bankruptcy. Chevron and COHO entered into an agreement for removing equipment and soil containing NORM from the entire Brookhaven field which was approved by the Bankruptcy Court, the Mississippi Oil and Gas Board, ("Board") and the Mississippi Department of Health. Many plaintiffs who sought relief in Lincoln County from the same defendants have allowed the cleanup. The Smiths filed this lawsuit immediately upon learning of the contamination and have continued to refuse the cleanup.

DISCUSSION

¶ 10. *Donald v. Amoco Prod. Co.,* 735 So.2d 161 (Miss.1999), sets a binding precedent in cases where plaintiffs seek to have oil producers clean up byproduct pollution. Under that case, plaintiffs must seek restoration from the Mississippi Oil and Gas Board before a court can properly assess the appropriate measure of damages.

¶ 11. Where an administrative agency regulates certain activity, an aggrieved party must first seek relief from the administrative agency before seeking relief from the trial courts. *State v. Beebe,* 687 So.2d 702, 704 (Miss.1996) (*citing NCAA v. Gillard,* 352 So.2d 1072, 1082-83 (Miss.1977); *Everitt v. Lovitt,* 192 So.2d 422, 426

(Miss.1966); *Davis v. Barr,* 250 Miss. 54, 157 So.2d 505 (1963)). *Donald* states that, in cases where private plaintiffs are seeking clean up of oil production byproducts, the Oil and Gas Board "remedy is adequate and should ... [be] exhausted prior to filing a private suit." *Donald,* 735 So.2d at 177. This Court cannot ignore *Donald* and fail to force the Smiths to seek relief from the Oil and Gas Board before filing suit in the trial court.

¶ 12. We also note that Mississippi law provides that it is the duty of the Oil and Gas Board to "make adequate rules and regulations ... requiring the disposal of waste products such as, but not limited to, mud, acids, saltwater or any corrosive products brought to the surface from any oil, gas or condensate well in this state, to prevent seepage, overflow or damage and injury to the topsoil or surface." Miss.Code. Ann. § 53-1-17(*l*) (1999). The Oil and Gas Board has seen fit to classify NORM as part of this list and to promulgate regulations defining the proper methods for preventing NORM pollution and for the disposal of such byproducts. Miss. Oil & Gas Bd. R. 68 & 69. In the creation of the Oil and Gas Board, the intent of the Legislature was that the Board was to protect the general public from the dangers inherent in the production of oil and gas. Miss.Code Ann. § 53-1-17 (1999).

¶ 13. The regulatory scheme promulgated by the Legislature and the Oil and Gas Board is designed to protect the citizens of Mississippi from pollution resulting from oil and gas drilling operations. Pollution resulting from operations like Chevron affects the entire population of Mississippi, and every citizen has an interest in seeing that violations of statutes and regulations are enforced. Thus, pollution clean up operations have been deemed the responsibility of the Oil and Gas Board. The Board possesses a specialized knowledge of the dangers presented by oil and gas exploration and drilling, and its collective expertise in such areas as the proper disposal methods for radioactive waste is the best asset available in developing an effective disposal plan for the NORM in the Brookhaven

field. The Board is more suited than the average juror to understand the broad scope of the regulations and the factual scenarios presented by each case of environmental pollution.

¶ 14. This Court cannot allow a private landowner to pursue restoration of his or her land in the courts of this State by sidestepping a very vital and useful agency that could help protect the average Mississippian from the dangers of NORM pollution. Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of NORM contamination. Nor will this Court allow a windfall to the plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup. Not only will requiring the aggrieved property owner to pursue his claims with the Oil and Gas Board alert the Board to possible wide-reaching violations, it will benefit the courts of this state by helping reduce the amount of time necessary to try cases like this one (if the seven week trial in this instance was not enough). The citizens of this state are better served by having an expert regulatory agency enforce the environmental statutes rather than waiting for the private citizen to bring individual actions for damages and restoration, which are no guarantee that the pollution will be eradicated. Therefore, due to the Smiths' failure to exhaust remedies available to them from the Mississippi Oil and Gas Board prior to bringing the present litigation, this Court must reverse and render. Given this disposition, this Court does not separately address the punitive damages and venue issues.

CONCLUSION

¶ 15. Because the Smiths refused all offers of cleanup, by-passed the administrative remedy provided by the Oil and Gas Board and filed suit prior to exhausting administrative remedies, this Court must continue to adhere to *Donald.* Accordingly, we reverse the trial court's judgment, and we

render the judgment here dismissing the Smith's complaint and this actions without prejudice for failure to exhaust administrative remedies. The Smiths are required to seek clean up relief before the Mississippi Oil and Gas Board.

¶ 16. **REVERSED AND RENDERED.**

PITTMAN, C.J., WALLER, COBB AND CARLSON, JJ., CONCUR. McRAE, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, J. EASLEY, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. GRAVES, J., NOT PARTICIPATING.

McRAE, P.J., Concurring in Part and Dissenting in Part:

¶ 17. Because the majority's interpretation of *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss.1999), is not sound, I disagree. The Smiths were not required to exhaust administrative remedies by seeking restoration of their property from the Mississippi Oil and Gas Board before seeking relief in the trial court. However, I agree with the majority that the judgment in this case should be reversed. The trial court erred in fashioning the judgment from special interrogatories posed to the jury. Therefore, I would affirm the jury's determination that Chevron is 100% liable for its negligence and reverse for a new trial on damages. I would also grant the cross-appeal on punitive damages. Accordingly, I concur in part and dissent in part.

¶ 18. In *Donald,* we held that "the administrative remedy [was] adequate and should have been exhausted prior to filing a private suit." *Donald,* 735 So.2d at 177. It was not mandatory. It is true that the Board has jurisdiction to approve or order cleanup that will protect the public interest. Miss.Code Ann. § 53-1-17(1) (1999) states that "the board shall have jurisdiction and authority over all persons and

property necessary to enforce effectively the provisions of this chapter and all other laws relating to the conservation of oil and gas." *See also* Miss.Code Ann. § 53-1-29. However, we also noted in *Donald* that our oil and gas "statutes and regulations do not provide for or prohibit private causes of action." 735 So.2d at 177. The issue in *Donald* was strict liability for waste disposal. The complaint specifically alleged that one of the defendants transported oil field waste to Donald's property and disposed of it there. *Id.* at 164. The case sub judice deals with NORM, not "the wrongful act of waste disposal" but more importantly, not strict liability. *Id.* at 167. Strict liability is a question of law, not a question of fact. General liability is a question of fact and should be sent to a jury for that determination.

¶ 19. While the exhaustion of administrative remedies may be necessary in some instances, there are other issues in this case that do not require complete exhaustion before the Board, namely, who is liable and to what extent. *Donald* does not preclude the Smiths from seeking damages from Chevron. *Id.* at 177. The Smiths have an option to pursue cleanup under our oil and gas statutes, *see* Miss.Code Ann. §§ 53-1-1 to -207 (1999), and while this is the preferred route to take, the decision to seek cleanup through the Board is not dispositive of the suit for damages in this case. The majority overlooks that *Donald* also allows the recovery of special damages. 735 So.2d at 177.

¶ 20. I agree that the Smiths have no obligation to remediate the property and that it would be economic folly for them to spend the $2.3 million award for restoration to increase the property value to $55,000. I also agree with the majority that the Smiths may be unjustly enriched if the general verdict is allowed to stand and they pocket the money awarded for damages since they have the option to pursue cleanup through the Board. Therefore, I would reverse the judgment. However, I would affirm the jury's finding that Chevron is 100% liable for the cleanup since that finding is supported by the evidence in the record. There is no limit on the cost or expense to Chevron to

perform the cleanup. If it costs $2.3 million or $2.3 billion, Chevron is liable for completion of the cleanup.[31]

¶ 21. The trial court erroneously fashioned the $2.3 million judgment from the special interrogatories. First, the trial court gave the jury, the trier of fact, the choice of which legal rule to apply. Such legal determinations are for the court to make, not the jury. Moreover, the special interrogatory posed to the jury regarding compensatory damages is flawed. Also, a judgment in the amount of $2.3 million is improper pursuant to *Waggener v. Leggett,* 246 Miss. 505, 150 So.2d 529 (1963). The Smiths were not entitled to the compensatory damages award in excess of the diminution in value of the land. In *Waggener,* the defendants dredged a bayou and caused the plaintiffs' shoreline to collapse. *Waggener,* 150 So.2d at 531. The diminution in value was found to be no more than $500 so the trial court excluded evidence that it would cost $7,500 to restore the shore line holding that it was a permanent damage to the land and therefore the difference in the value of the land before and after the trespass was the appropriate measure of damages. *Id.* at 531. *Waggener* distinguished between permanent and temporary injury to land and the applicable measure of damages and held as follows:

> For an injury to the land itself, permanent in nature, the general rule measuring damages is the difference in value of the land before and after the trespass. This means the difference in value of the entire tract, not merely the ground at the exact place of the injury. However, where the land can be restored to its former condition at a cost less than the diminution in value, if it is not restored, and also where the injuries are temporary and reparable in this sense, the cost of restoration

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[31]Of course, COHO and Florabama may be contractually liable to Chevron for cleanup, but that matter is not before us.

> may be used as a measure of damages. This latter rule is confined to cases where the cost of restoration is less than the difference in the value of the land before and after the trespass. *See Union Producing Co. v. Pittman,* 245 Miss. 427, 146 So.2d 553 (1962).

Waggener, 150 So.2d at 531. Temporary injury simply means that the injury is reparable. There is testimony that the value of the Smiths' land with no contamination was $55,000 and that there was a complete diminution of that value. Following *Waggener,* the largest amount of compensatory damages the Smiths can recover is $55,000, if there was in fact a complete diminution in value or if the cost of restoration exceeds the value of the land. *Id. Donald* also allows for special damages. *Donald,* 735 So.2d at 177.

¶ 22. Since the majority concludes that the Smiths should have gone to the Oil and Gas Board, it did not address the mistrial on punitive damages either. The Smiths filed a motion for a retrial limited to the issue of punitive damages which the trial court denied stating that "it cannot grant a new trial solely on the issue of punitive damages since Miss.Code Ann. § 11- 1-65 (1972 as amended) requires that the same trier of fact hear evidence on both compensatory and punitive damages." On cross-appeal, the Smiths seek reversal of that order.

¶ 23. The Smiths rely upon Miss.Code Ann. § 11-1-65 (2002); *McCorkle v. McCorkle,* 811 So.2d 258 (Miss.Ct.App.2001); and *Paracelsus Health Care Corp. v. Willard,* 754 So.2d 437 (Miss.1999).[32] These two cases were

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[32]The Smiths also cite to case law outside of our jurisdiction. *See King v. Macri,* 993 F.2d 294 (2d Cir.1993), *Mattison v. Dallas Carrier Corp.,* 947 F.2d 95 (4th Cir.1991); *Grynberg v. Citation Oil & Gas Corp.,* 573 N.W.2d 493 (S.D.1997). While case law outside of

(continued...)

remanded on punitive damages only. In *McCorkle,* the issue of punitive damages was never submitted to the jury during trial. Finding that the trial court erred, the Court of Appeals remanded the case on the issue of punitive damages only for submission to a jury. *McCorkle,* 811 So.2d at 271. Obviously, the original jury had already been dismissed so a different jury determined punitive damages on remand.

¶ 24. Chevron correctly states that § 11-1-65(1)(c) requires the same trier of fact to determine whether to award punitive damages after it determines compensatory damages. However, Chevron suggests that since § 11- 1-65(1)(c) mandates that in order to have a retrial on punitive damages, the Smiths would have to request a new trial as to all damages so that the same jury could determine compensatory and punitive damages. This simply is not so, especially in light of the fact that the jury was deadlocked on the issue. On retrial for punitive damages, a trial court must merely give a jury instruction as to the compensatory damages already awarded.

¶ 25. The issue of punitive damages is no different from any other issue on which a jury is deadlocked; a retrial can be granted as to the issue which the jury was unable to decide. The trial court could have granted a new trial on punitive damages alone without contravening § 11-1-65. Since the trial court denied a new trial on the basis that § 11-1-65 would not permit it, I would reverse and remand on the matter of punitive damages with an instruction that the trial court inform the jury of the findings of the original jury. Since I would also reverse and remand for a determination

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[32](...continued)
our jurisdiction may be instructive at times, the cases cited by the Smiths are wholly inapplicable to this case as they all involve challenges to punitive damages awards which were all decided by the same jury that determined compensatory damages.

of compensatory damages, the same jury would be deciding compensatory and punitive damages after all.

¶ 26. I find that *Donald* did not require that the Smiths exhaust administrative remedies. However, I would reverse and remand this case for a new trial on compensatory damages limited to the diminution in value of the property pursuant to *Waggener* and special damages pursuant to *Donald.* The jury's finding that Chevron was 100% liable should stand. I would also remand for a new trial on punitive damages. Accordingly, I respectfully concur in part and dissent in part.

DIAZ, J., JOINS THIS OPINION.

EASLEY, J., Concurring in Part and Dissenting in Part:

¶ 27. I respectfully concur in part and dissent in part. I agree with the majority's decision to reverse the $2,349,275 judgment granted against Chevron U.S.A., Inc., but I would reverse and grant a remittitur rather than reverse and render. In 1979, the Smiths, who lived in Wisconsin at the time, purchased the surface rights to the 55 acres located in Lincoln County, Mississippi. The Smiths never lived on any of the 55 acres in question. The property was purchased with the intent that someday they might build a retirement home on it.

¶ 28. The value of the Smiths' land without contamination is $55,000. In my opinion, the judgment awarded against Chevron in the amount of $2,349,275 for contamination of the 55 acres unjustly enriches the Smiths. It is illogical to believe that the Smiths would spend their $2,349,275 award to restore the property to its uncontaminated value of $55,000. Furthermore, in my opinion, awarding the Smiths $2,349,275 to restore the property to its pristine value of $55,000 amounts to economic waste.

¶ 29. Here, we have a complete diminution of the value of the 55 acres and the cost of restoration exceeds the $55,000 set as the value of the land without contamination. Accordingly, the judgment against Chevron should be reversed and a remittitur granted from the trial court's award of $2,349,275 to $55,000. *See Waggener v. Leggett,* 246 Miss. 505, 508-09, 150 So.2d 529, 531 (1963); *Union Producing Co. v. Pittman,* 245 Miss. 427, 437, 146 So.2d 553, 557 (1962).

¶ 30. My primary concern is that we have no power over the Smiths to ensure that they will actually spend the $2,349,275 judgment to actually cleanup the property. Therefore, I believe that the learned trial court and the majority have erred in their determinations. The Smiths may request that the Mississippi Oil and Gas Board (Board) order Chevron to restore the property to its pristine condition, regardless of the cost of the cleanup (be it $2,349,275 or some other amount). However, pursuing the cleanup of the property via this avenue would ensure that the property will be restored to its pristine condition. This option prevents the unjust enrichment or economic waste of the $2,349,375 award to the Smiths.

¶ 31. The Board still retains jurisdiction over the contamination and can order the operators to perform the cleanup until its completion. Miss.Code Ann. § 53-1-17(7)(1999) provides:

> Notwithstanding any other provision contained in the Laws of the State of Mississippi, the [b]oard shall have exclusive jurisdiction and authority, and it shall be its duty, to make, after notice and hearing as hereinafter provided, such reasonable rules, regulations, standards and orders, and to issue such permits as may be necessary, to regulate the use, management, manufacture, production, ownership, investigation and noncommercial disposal of oil field

> exploration and production waste in order to prevent, eliminate or reduce waste by pollution to acceptable levels in order to protect the public health, safety and the environment.

¶ 32. If either of the parties is aggrieved by the decision rendered by the Board, the appellate process is still available. The complaining party may appeal the Board's findings if the agency's actions (1) were unsupported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency, or (4) violated some statutory or constitutional right of the complaining party. *Boyles v. Miss. State Oil & Gas Bd.*, 794 So.2d 149, 152 (Miss.2001); *Miss. Employment Sec. Comm'n v. Harris*, 672 So.2d 739, 741 (Miss.1996); *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So.2d 1211, 1215 (Miss.1993); *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 317 (Miss.1992).

¶ 33. The Smiths have never pursued this course of action to have the property cleaned up. Instead, they filed suit in Hinds County, Mississippi. Furthermore, as noted by the majority, the Smiths have refused attempts to have the property cleaned. Chevron and COHO entered into an agreement to remove the equipment and soil containing the naturally occurring radioactive material (NORM) which was approved by the Bankruptcy Court, the Board and the Department of Health. COHO was granted summary judgment precluding the Smiths' recovery of the cost of removal based on the Smiths' refusal to allow the cleanup of the property.

¶ 34. As to the punitive damages, I believe that Miss.Code Ann. § 11-1-65 (2002) does not prevent retrial on the limited issue of punitive damages. While the normal procedure is to allow the same trier of fact to hear both the compensatory and punitive damages, I do not believe that Miss.Code Ann. § 11-1-65 prevents retrial on the limited

issue of punitive damages where the original trier of fact was unable to reach a verdict on that particular issue.

APPENDIX B

SUPREME COURT OF MISSISSIPPI

CHEVRON U.S.A., INC.
v.
ALCUS SMITH AND KAY SMITH

No. 1999-CA-01658-SCT

Oct. 17, 2002

Reversed and Rendered. Appellees taxed with costs of appeal.

Motion of Chevron U.S.A., Inc., to Supplement the Record is denied. Amended Motion to Supplement the Record filed by Alcus and Kay Smith is denied. Order entered.

APPENDIX C

SUPREME COURT OF MISSISSIPPI

CHEVRON U.S.A., INC.
v.
ALCUS SMITH AND KAY SMITH

No. 1999-CA-01658-SCT

May 22, 2003

MANDATE

Motion for Rehearing filed by appellees is denied. McRae, P.J., and Diaz, J., would grant. Graves, J., not participating.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, Betty W. Sephton, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on May 29, 2003, A.D.

/s/ Betty W. Sephton
Clerk

APPENDIX D

[*EXCERPTS FROM MOTION FOR REHEARING*]

IN THE SUPREME COURT OF MISSISSIPPI

No. 1999-CA-01658

CHEVRON U.S.A. INC. — **APPELLANT/ CROSS-APPELLEE**

V.

ALCUS SMITH and KAY SMITH — **APPELLEES/ CROSS-APPELLANTS**

APPELLEES' MOTION FOR REHEARING

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[*OMITTED*]

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[*OMITTED*]

ARGUMENT

The October 17, 2002 decision of this Court,[1] respectfully, should be reconsidered. The majority opinion, which purports to be grounded on the Court's earlier decision in *Donald*,[2] expands one aspect of the *Donald* opinion so much that it effectively overrules the remainder of the case. When viewed closely, the *Smith* opinion holds that a landowner whose property has been contaminated by radioactive oil field waste is limited to whatever relief the Oil and Gas Board chooses to grant him - if any. The owner himself is precluded from recovering the cost of decontaminating his land, on the unsupported judicial assumption that he will never spend the money to remove the pollution. The decision has gone far beyond the scope of whatever statutory scheme the legislature had in mind when it created the Oil and Gas Board, has inadvertently drawn into question, if not actually overruled, decades of case law and long-established principles of appellate review, appears to hold that an injured party has a duty to accept whatever settlement offer might be tendered to him, and has created constitutional questions that were not not raised, briefed or argued by the parties - or considered by this Court. It is, in short, a decision of major significance in many areas, which oil companies have wasted no time in disseminating to courts in this and other states. In an ultimate irony, the opinion is already the basis of a motion to dismiss *Donald* - the very case which the October 17 opinion holds to be its foundation.

Given its profound effect, this Court should consider the legal and factual misperceptions upon which the opinion

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[1] *Chevron U.S.A., Inc. v. Smith*, 1999-CA-01658-SCT (Miss. October 17, 2002).

[2] *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss. 1999).

is based, and the unbriefed, unargued and unrecognized problems which the opinion creates. MRAP 40 requires the Smiths to point to specific, particular areas of law and fact overlooked or misapprehended by the Court. These will be separately discussed below.

I. THE OPINION SILENTLY OVERRULES *DONALD*.

[*OMITTED*]

II. THE OPINION EITHER IGNORES, OR ELSE HAS IMPLICITLY OVERRULED, WELL-ESTABLISHED PRINCIPLES OF APPELLATE REVIEW.

[*OMITTED*]

III. THE OPINION APPEARS TO REQUIRE A PLAINTIFF TO ACCEPT ANY SETTLEMENT OFFER, REGARDLESS OF ITS SUFFICIENCY.

[*OMITTED*]

IV. THE OCTOBER 17 OPINION VIOLATES THE MISSISSIPPI AND U.S. CONSTITUTIONS.

At first blush, the October 17 opinion appears simply to require that a landowner first present his claim to the Oil and Gas Board. When viewed closely, however, the opinion goes much farther. This Court, in this opinion, has now prohibited the landowner from recovering his damages, regardless of what action the Oil and Gas Board takes. The

consequences are significant under the constitutions of this State and this country.

The flaw in the opinion is that it assumes that the Oil and Gas Board will actually order a cleanup if presented with a claim. Experience shows that this is likely to be a false assumption. For example, in all the decades Chevron operated the Brookhaven field, the Oil and Gas Board did, precisely, nothing. It never ordered a cleanup of the Smiths' property, or of ***any*** property in the field, not in the 50 years Chevron contaminated the land, not in the 16 years since Chevron told the EPA and the OGB that there was NORM on and under the land, not in the seven years of the Brookhaven litigation, and not to the present day. In fact, in a related matter, a request for the Oil and Gas Board to hold hearings on the Chevron-COHO proposed Brookhaven Field cleanup plan prompted a letter by the Oil and Gas Board's attorney, announcing that the Board preferred to defer to the judicial system.[29] Under the circumstances of the Smiths'

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[29]July 8, 2000 letter of Robert C. Travis to John D. Smallwood, attached hereto as Exhibit B. The letter states, in part:

> Re: Your letter of July 7, 2000 to Mr. Walter Boone, Supervisor for the Mississippi State Oil and Gas Board, concerning Chevron's Remediation Plan for the Brookhaven Oil Field in Lincoln County, Mississippi.
>
> * * *
>
> I assume that the purpose of your letter is to put the Oil and Gas Board on notice under requirements of Miss. Code Ann. Section 53-1-43(b), so consider that you have met the notice requirements thereof. The Mississippi State Oil and Gas board has no intention at this time of filing suit against Chevron U.S.A., Inc.

(continued...)

case, sending them to the Oil and Gas Board is requiring them to perform a useless task. "When a governmental entity will not act, resort to the courts is appropriate." *Mississippi Dept. of Environmental Quality v. Weems*, 653 So.2d 266, 277 (Miss. 1995), citing *City of Lake Station v. State ex rel. Moore Real Est.*, 558 N.E.2d 824 (Ind. 1990).

Nevertheless, the October 17 opinion requires the Smiths to go to the Oil and Gas Board. And if the Board does nothing, the Smiths are ***still*** precluded from recovering their damages, because, as discussed earlier, the Court has ruled that they will be unjustly enriched. Consequently they will never be able to clean up their land. Yet they cannot transfer their property until it is cleaned up,[30] and they remain legally liable for the contamination, under both Mississippi law and federal law.[31] Under Mississippi's constitution they have been denied a remedy. Under the Mississippi and the United States constitutions, they have been treated unequally, deprived of property and denied their right to a jury trial.

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[29](...continued)
or any other party, regarding this matter.

> You are obviously aware of the pending suit filed in the Lincoln County Circuit Court.....We believe this matter brings Chevron's Remediation Plan before the Court fully and completely.
>
> If you want to pursue this matter in the Lincoln County Chancery Court as well, then you apparently have a perfect statutory right to do so.

[30]See discussion of this point in Brief of Appellees/Cross-Appellants, at page 15.

[31]See discussion of this point in Brief of Appellees/Cross-Appellants, at pages 15 and 25, and at footnote 45.

A. The Smiths have been denied a remedy, in violation of the Mississippi Constitution.

> All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.[32]

Certainly the Smiths, under common law, had every right to recover damages for the injuries they sustained in this case. Yet all their claims - ranging from breach of contract through negligence to strict liability - all of them have been lost, and replaced with a dubious, and final, appeal to the Mississippi Oil and Gas Board. They face the very real prospect of recovering nothing (or, at most, the diminished market value of their land), while remaining liable for cleanup costs and unable to alienate their land until it is remediated. This is a violation of Article 3, Section 24.

In *American Bankers Ins. Co. of Florida v. Alexander*, 818 So.2d 1073 (Miss. 2001), plaintiffs brought common law claims for breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent misrepresentation and negligent misrepresentation against an insurer. The insurer argued that the claims were barred by the filed rate doctrine. This Court held that Article 3, Section 24 (guaranteeing a remedy) and Article 3 Section 31 (guaranteeing trial by jury) prevented such a result:

> The filed rate doctrine has never been held to be an absolute bar to litigation. ***To apply the filed rate doctrine in this manner would be an encroachment by regulatory agencies into***

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[32]**Mississippi Constitution, Article 3 Section 24.** Open courts; remedy for injury.

> ***the court system and would deprive the plaintiffs of their right to trial by jury.***[33]

And in *Fordice v. Thomas*, 649 So.2d 835, 841 (Miss. 1995) this Court affirmed that an injured party cannot be forced to depend upon the discretion of a state agency in order to press his claim:

> [P]laintiffs call to the court's attention Miss. Const. §§ 24 (1890), which provides that "every person for an injury done him in his lands, goods, person or reputation shall have remedy by due court of law," and §§ 25 which provides that "no person shall be debarred from prosecuting ... any civil action cause before any tribunal in the state."

The October 17 opinion restricts injured landowners to whatever relief the Oil and Gas Board chooses to dispense. The Smiths have lost the right to recover restoration costs. They are stuck with land unsafe to live on, yet which may not be sold. Other landowners will suffer other damages. The Board itself has no power under its enabling statutes to award contract damages, or punitive damages, or damages for emotional distress, pain or suffering, lost income, damage to crops or timber, or any of a wide variety of other injuries. Landowners in this state therefore no longer have a remedy for their injuries. The *Smith* decision has thus clearly violated this State's constitution. This Court should grant the motion for rehearing so that this constitutional violation may be reconsidered.

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[33] *American Bankers Ins. Co. of Florida v. Alexander*, 818 So.2d 1073, 1084 (Miss. 2001). Emphasis added.

B. The court has intruded into the province of the legislature, in violation of the separation of powers doctrine.

Courts cannot amend statutes by judicial construction; *State v. Heard*, 151 So.2d 417 (Miss. 1963).

> The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the Legislature. Neither have the courts authority to write into the statute something which the Legislature did not itself write therein, nor can they ingraft upon it any exception not done by the lawmaking department of the government.[34]

This Court noted in *Donald* that the Mississippi statutes and regulations establishing and governing the Oil and Gas Board "do not provide for or prohibit private causes of action."[35] Yet the October 17 decision now prohibits a private cause of action to recover restoration costs. Indeed, it goes further, and judicially creates a requirement to prosecute a proceeding before a state agency, although the legislation establishing that agency contains no such requirement.[36] The result is a violation of Mississippi's

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[34]*Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466, 490 (1911), cited in *Wallace v. Town Of Raleigh*, 815 So.2d 1203, 1208 (Miss. 2002).

[35]*Donald*, at ¶54.

[36]Miss. Code Ann. §53-1-29 - now the landowners' exclusive remedy under the October 17 opinion - says simply that "Any (continued...)

separation of powers doctrine, as contained in Article 1, Section 1 of the Constitution.[37]

C. The decision denies the Smiths equal protection.

As the majority opinion notes, "no court can order the plaintiffs in this case to expend the award on decontaminating the property."[38] This is true in virtually all cases. "Ordinarily, nothing compels a successful plaintiff to spend money recovered in construction defect litigation on repairs....While there have been exceptions, courts do not ordinarily tell successful plaintiffs how to spend their tort recoveries."[39] This is equally true in contract cases. Yet owners of property contaminated by radioactive oil field waste are now restricted in their rights and remedies where other injured parties are not. Indeed, if cases such as *Sun Oil Company v. Nunnery*, 251 Miss. 631, 170 So.2d 24 (1964) are still good law (which they may no longer be), owners of land contaminated by *non-radioactive* waste are not required to exhaust their remedies with the Oil and Gas Board. Facially, then, similarly-situated people have been treated

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[36](...continued)
interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the board by making a request therefor in writing."

[37]"The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."

[38]*Smith*, at ¶14.

[39]*Aas v. Superior Court*, 24 Cal.4th 627, 12 P.3d 1125, 1010 Cal.Rptr.2d 718 (2000).

unequally as a result of this Court's interpretation of the Oil and Gas Board statutes.

D. The Smiths have been denied their right to a jury trial under the Seventh Amendment.

> The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." U.S. Const., Amdt. 7. Since Justice Story's time, the Court has understood "Suits at common law" to refer "not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons v. Bedford,* 3 Pet. 433, 447, 7 L.Ed. 732 (1830) (emphasis in original). The Seventh Amendment thus applies not only to common-law causes of action, but also to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 42, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989) (citing *Curtis v. Loether,* 415 U.S., at 193, 94 S.Ct., at 1007-1008).[40]

The Smiths' right to a trial by jury of their claim for restoration costs - the only costs which will allow them to

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[40]*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998).

actually restore their land to habitable condition - has now been placed exclusively in the hands of the Oil and Gas Board. This delegation of ultimate authority violates the Seventh Amendment and Article 3, Section 31 of the Mississippi Constitution.

E. The October 17 decision violates the Fifth Amendment's "Just Compensation" clause.

The "just compensation" clause applies to states through the Fourteenth Amendment; *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226,17 S.Ct. 581, 41 L.Ed. 979 (1897). This Court's deprivation of the Smiths' rights to recover damages is a "taking" for the "public purpose" of encouraging OGB regulation. It is therefore a *prima facie* violation of the Fifth Amendment.

F. The decision is also a violation of the Due Process Clause.

Clearly the Smiths have been deprived of property, in that they are not permitted to prosecute their claims for full damages. Such claims have been found to be property under the meaning of the Constitution. See, e.g., *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804, 116 S.Ct. 1761, 1769, 135 L.Ed.2d 76 (1996); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430, 102 S.Ct. 1148, 1154- 1155, 71 L.Ed.2d 265 (1982); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-2975, 86 L.Ed.2d 628 (1985) (relying on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *Hansberry v. Lee*, 311 U.S. 32, 37, 61 S.Ct. 115, 116, 85 L.Ed. 22 (1940). Equally clearly, their remedy has now been limited to whatever the Oil and Gas Board chooses to award them. Delegation to the Oil and Gas Board of the ultimate responsibility for awarding damages is not due process.

CONCLUSION

The October 17 opinion raises more questions than it answers. Many of those questions are of constitutional dimensions. All of them are of significant importance to the jurisprudence of this, and other, states. None of them has been the subject of briefs or arguments submitted to this Court. All of them appear to be founded on misapprehensions of law. For purposes of clarity and consistency, it is vital that this Court re-examine the opinion.

APPENDIX E

[*EXCERPTS FROM CHEVRON'S ANSWER TO MOTION FOR REHEARING*]

IN THE SUPREME COURT OF MISSISSIPPI
No. 1999-CA-01658

CHEVRON U.S.A. INC. — **APPELLANT**

V.

ALCUS SMITH and KAY SMITH — **APPELLEES**

RESPONSE OF APPELLANT IN OPPOSITION TO MOTION FOR REHEARING

[*ONLY PART III OF CHEVRON'S RESPONSE IS REPRODUCED HERE*]

III. THE SMITHS' MERITLESS CONSTITUTIONAL CLAIMS HAVE BEEN WAIVED.

Part IV of the motion consists entirely of constitutional attacks upon this Court's holding. These attacks must fail for two reasons. First, the Smiths have waived these arguments by failing to raise them earlier in this action. Second, the remedy to which this Court has remitted the Smiths is plainly sufficient under constitutional principles.

The law of waiver is quite clear. A party cannot assert for the first time on appeal a theory of his case that was not presented in the Circuit Court: Estate of Haynes v. Steele,

699 So.2d 918, 926 (Miss. 1997) ("Court has repeatedly held that no new issues may be raised on appeal") Strait v. Pat Harrison Waterway Dist., 523 So.2d 36, 41 (Miss. 1988) (party must pursue same theory on appeal as in trial court; "entirely different line of battle" than below not properly before appellate court), overruled on other grounds, Churchill v. Pearl River Basin Dev. Dist., 619 So.2d 900 (Miss. 1993); Illinois Cent. R. Co. v. Sumrall, 96 Miss. 860, 51 So. 545, 546 (1910) (Court reverses and remands for judgment to be entered in favor of defendant; plaintiff cannot seek affirmance on different theory; appellate court limited by case as it was presented below, "and on *that* case, as shown by *this* record, a peremptory instruction should have been given for the railroad company") (emphasis added). This rule is especially strong where, as here, "constitutional questions are concerned." Ellis v. Ellis, 651 So.2d 1068 (Miss. 1995).

Although Chevron urged the Circuit Court to defer to the jurisdiction of the Board, the Smiths never argued that such deference would be unconstitutional. Such an argument would necessarily constitute an attack on the validity of § 53-1-17, on which this Court based its judgment in this case and in Donald. Any such constitutional challenge would have required the Smiths to give notice to the Attorney General under M.R.C.P. 24(d); of course, no such notice has ever been given.

The Smiths candidly admit that they failed to raise these issues in this Court. Motion at 1. Although Chevron plainly reiterated its jurisdictional argument in Part I.B of its initial brief, the Smiths' response at pages 22-25 of their initial brief raised no constitutional claims whatsoever. It is much too late to do so in a motion for rehearing. As this Court has explained:

> The purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief for this court. Judicial economy dictates that we consider

> only those assignments of error set forth in the original brief. The purpose of the petition for rehearing is to allow the parties to point out "the points of law or fact which in the opinion of the petitioner this Court has overlooked or misapprehended...." Miss. Sup. Ct. Rule 40. We cannot misapprehend or overlook that which is not presented for our review.

MST, Inc. v. Mississippi Chem. Corp., 610 So.2d 299, 304 (Miss. 1992). The constitutional claims set forth in Part IV of the Smiths' motion for rehearing have therefore been waived.

The Smiths' constitutional claims themselves are based on a misunderstanding of this Court's opinion and of the nature of administrative bodies. As explained in Part I above, this Court has merely required the Smiths to begin their quest for a remedy before the Board; it has not reached the question of what remedy might be available to them on judicial review if they are able to demonstrate the inadequacy of the relief to be granted by the Board. Once again, their chief complaint seems to be the loss of a remedy which Mississippi law has never granted them - the right to collect more damages than their property is worth with no obligation to remediate the property. The Constitution cannot be offended by the loss of a right which never existed.

More generally, the Smiths seem to claim that any common law remedy which may exist can never be replaced by a remedy before an administrative agency. Mississippi law has been clearly established to the contrary for almost half a century. Every constitutional argument which the Smiths direct against the jurisdiction of the Board was likewise hurled at the Workmen's Compensation Commission shortly after its establishment. Each of those claims was rejected in Walters v. Blackledge, 220 Miss. 485, 71 So.2d 433 (1954). In the ensuing 48 years, this Court has never retreated from its recognition of the power of the Legislature to commit controversies to the jurisdiction of

administrative agencies, subject to ultimate judicial review.[7] The cases cited by the Smiths represent no such retreat.

In Fordice v. Thomas, 649 So.2d 835 (Miss. 1995), this Court simply found that the claim being asserted by plaintiffs was not one which had been committed by the Legislature to the jurisdiction of an administrative agency. The Court observed "that this case is not about the Permit Board's grant or denial of the hazardous waste facility permit," but about the Governor's failure "to give the public an opportunity to offer comments before the adoption of" a new environmental rule. Id., at 840. "Since the Constitution or the statute did not vest jurisdiction in a particular court [to consider that particular claim], the circuit court had the authority under our Constitution and the State Bill of Rights to entertain such a suit." Id., at 841.

Moreover, the language the Smiths cite from American Bankers Ins. Co. v. Alexander, 818 So.2d 1073, 1084 (Miss. 2001), was thereafter explained in American Bankers Ins. Co. v. Wells, 819 So.2d 1196 (Miss. 2001). In Wells, the Court explained that in Alexander, an interlocutory appeal, the conflict between the claims presented and the filed rate doctrine was not apparent. The Court continued:

> Unlike Alexander, however, the present appeal arises following a trial on the merits, rather than on interlocutory appeal prior to trial. As such, this Court has before it in the record the allegations and the evidence raised by the plaintiffs at trial. This record makes it abundantly clear that the plaintiffs alleged before the jury that the CPI policy rates were

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[7]Indeed, this Court has recently reaffirmed that "the remedy clause [Miss. Const. Art. 3, § 24 (1890)] is not an absolute guarantee of a trial." City of Jackson v. Sutton, 797 So.2d 977, 980 (Miss. 2001), quoting Mohundro v. Alcorn County, 675 So.2d 848, 852 (Miss. 1996).

> too high and sought to recover on this basic issue.

Id., at 1205 n.2. On this full record, this Court expressly endorsed the binding effect of administrative determinations: "A civil juror, who likely has little, if any, expertise in the area of insurance rates and policies, should not be permitted to reject and thereupon impose liability based on the rates of a policy which is expressly approved by the Department of Insurance." Id., at 1204. This Court used substantially similar language in approving the Legislature's commitment of jurisdiction over oil field remediation to the Board. Opinion ¶ 13.

The Smiths' constitutional challenges are both too little and too late. They should be rejected by this Court.